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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PHILLIP ALTENDORF AND JEFFERY ALTENDORF,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 04-4032-JAR**
DODSON INTERNATIONAL PARTS, INC.,	)	
Defendant,	)	

MEMORANDUM AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This matter is before the Court on defendant's Motion to Dismiss (Doc. 2). Plaintiffs, Phillip and Jeffrey Altendorf, filed a Complaint pursuant to Fed. R. Civ. P. 60(b) seeking relief from a judgment. Defendant asks this Court to dismiss plaintiffs' Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. The Court has reviewed the parties' filings and for the reasons set forth below, defendant's motion shall be granted.

I. BACKGROUND

On October 25, 2000, Dodson International Parts (Dodson) filed a Complaint against plaintiffs, Phillip and Jeffrey Altendorf, among others, alleging misappropriation of trade secrets and trade name, unfair competition, breach of fiduciary duty, unjust enrichment, RICO violations, and conspiracy.[1] To settle the case, the Altendorfs entered into a Settlement and

[1] *Dodson International Parts, Inc. v. Altendorf, et al.,* 00-4134-SAC.

Release Agreement on October 31, 2000. In that agreement, the Altendorfs agreed to

> immediately cease and desist in engaging in any aspect of the aviation industry including, but not limited to, the recovery, salvage, and sale of new and used or damaged fixed-wing aircraft, helicopters, and/or aircraft or helicopter parts for a period of five (5) years from the date of the signing of this agreement.

In conjunction with the Settlement Agreement, the parties agreed to the entry of a consent judgment against the Altendorfs in the amount of $ 5,000,000. Dodson agreed not to execute the consent judgment as long as the Altendorfs complied with the terms of the agreement. It is this judgment which plaintiffs seek to set aside in the instant action.

II. DISCUSSION

In its Motion to Dismiss, defendant argues that plaintiffs' Complaint should be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim upon which relief may be granted. The Court addresses each of defendant's arguments in turn.

A. Lack of Subject Matter Jurisdiction

Defendant argues that because no federal question has been alleged and because the parties, as Kansas citizens, are not completely diverse, subject matter jurisdiction is lacking and dismissal pursuant to Rule 12(b)(6) is appropriate. Federal courts, as courts of limited jurisdiction, derive their judicial power from and are absolutely limited by Article III, §2 of the Constitution.[2] There are essentially three bases for federal jurisdiction: federal question;[3]

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[2] *Ankenbrandt v. Richards*, 504 U.S. 689, 695-697 (1992).

[3] 28 U.S.C. §1331.

diversity;[4] or as expressed in Article III, §2, and 28 U.S.C. §§1345-1346, cases in which the United States is a party.[5] Where relief from a judgment is sought pursuant to Rule 60 in the federal court that rendered the initial judgment, however, the court has ancillary jurisdiction over the action.[6] This ancillary jurisdiction exists even when no federal question is raised and diversity is lacking.[7] As plaintiffs seek relief from a Journal Entry of Judgment entered by this Court on December, 14, 2000, ancillary jurisdiction is present and defendant's motion to dismiss for lack of subject matter jurisdiction is denied.

B. Failure to State a Claim

Defendant also alleges that plaintiffs have failed to state a claim upon which relief may be granted and seek dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[8] The court will dismiss a cause of action for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him to relief.[9] The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations.[10] In addition, all reasonable

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[4]28 U.S.C. §1332.

[5]*Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994).

[6]*Crosby v. Mills*, 413 F.2d 1273, 1275-76 (10th Cir. 1969).

[7]*Id.*

[8]Fed. R. Civ. P. 12(b)(6).

[9]*Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.,* 144 F.3d 1302, 1304 (10th Cir. 1998).

[10]*Maher,* 144 F.3d at 1304.

inferences are viewed in favor of the plaintiff.[11] The issue in resolving such a motion is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support the claims.[12] Because the Plaintiffs have set forth multiple claims for relief, the court will address each Count separately.

1. Count I: Judgment is Void

Plaintiffs seek relief pursuant to Fed. R. Civ. P. 60(b)(4) on the grounds that the judgment is void. Relief under this rule is left to the sound discretion of the court.[13] A judgment is not void merely because it is or may be erroneous; rather, for a judgment to be void, the court that rendered the judgment must have been powerless to do so.[14] This usually occurs where the court lacked subject matter jurisdiction or jurisdiction over the parties.[15] A judgment may also be void if the court's action involved a plain usurpation of power or if the court acted in a manner inconsistent with due process of law.[16] In the interest of finality, relief under Rule 60(b) will be narrowly constricted.[17] Such relief is extraordinary and will only be granted in exceptional circumstances.[18]

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[11] *Witt v. Roadway Express,* 136 F.3d 1424, 1428 (10th Cir. 1998).

[12] *In re Sprint Corp. Sec. Litig.,* 232 F. Supp. 2d 1193, 1213 (D. Kan. 2002) (citing *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974), *overruled on other grounds, Davis v. Scherer,* 468 U.S. 183 (1984)).

[13] *Caribou Four Corners, Inc. v. Truck Ins. Exchange,* 443 F.2d 796, 799 (10th Cir. 1971).

[14] *V.T.A., Inc. v. Airco, Inc.,* 597 F.2d 220, 224 (10th Cir. 1979)

[15] *Id.*

[16] *Id.* at 224-25; *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994).

[17] *V.T.A.*, 597 F.2d at 225, *citing* 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.25(2) (2d ed. 1978).

[18] *See F.D.I.C. v. United Pacific Inc. Co.,* 152 F.3d 1266, 1272 (10th Cir. 1998); *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co.,* 909 F.2d 1437, 1440 (10th Cir. 1990).

Plaintiffs have not alleged that the rendering court lacked jurisdiction to enter the judgment. Likewise, plaintiffs have not alleged any abuse of power or violation of due process. Instead, plaintiffs merely aver that the Judgment is void because the injunction is overly restrictive and violates public policy. Such an allegation, however, does not rise to the level of "plain usurpation of power" required to obtain relief from judgment. As the Tenth Circuit has noted in response to a similar argument:

> While it is conceivable that the injunction secures for [Defendant] rights greater than those contemplated by state and federal law, we cannot say that any error in this respect rises to the level of constitutional infirmity subject to collateral attack under 60(b)(4). We do not discern in this context a "plain usurpation" of power by the district court. Assuming that the judgment was erroneous in the first instance, the proper procedure for review would have been by direct appeal, not collateral attack.[19]

Plaintiffs have failed to establish that the judgement is void and, consequently, defendant's Motion to Dismiss Count I must be granted.

2. Count II: Judgment is Inequitable

Plaintiffs also seek relief under Fed. R. Civ. P. 60(b)(5) on the basis that the judgment is no longer equitable. The standard for relief under Rule 60(b)(5) is an exacting one and requires a strong showing.[20] The moving party must show that a changed condition requires modification or that the law or facts no longer require enforcement of the order.[21] The rule is not a substitute for appeal.[22] Indeed, a plaintiff must overcome a higher hurdle to obtain relief under 60(b) than

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[19] *V.T.A.*, 597 F.2d at 225-26.

[20] WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, CIVIL § 2863, 207-08 (1973).

[21] *Dowell by Dowell v. Board of Educ. of Oklahoma,* 8 F.3d 1501 (10th Cir. 1993).

[22] *See Klein v. U.*S., 880 F.2d 250, 258 (10th Cir. 1989).

on a direct appeal.[23] Rule 60(b)(5) is not an opportunity for a party to reargue an issue that has already been argued or present facts which were available for presentation at the time of the original judgment.[24]

In their Complaint, plaintiffs allege that they are entitled to relief from judgment because the judgment prohibiting them from engaging in any aspect of the aviation industry is "unreasonable, unduly burdensome, and against the public policy of Kansas." To support this allegation, plaintiffs cite several Kansas cases in which courts have stated that covenants not to compete must be reasonable and not adverse to public welfare. Kansas courts have recognized that covenants with no territorial limitation may be unreasonable when unnecessary for the protection of a legitimate business interest.[25] Similarly, a covenant will be unenforceable if its purpose is to avoid ordinary competition.[26]

Plaintiffs' reliance on the substantive law of covenants not to compete to support their 60(b)(5) motion is misplaced. It is well-settled that a motion for relief pursuant to Rule 60(b)(5) is not a substitute for a direct appeal; this principle applies with equal force to injunctions resulting from a consent judgment.[27] The Tenth Circuit has held that "an injunction, whether right or wrong, is not subject to impeachment in its applications to the conditions which existed

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[23] *See Bud Brooks,* 909 F.2d at 1439-40.

[24] *F.D.I.C.,* 152 F.3d at 1272; *Cashner v. Freedom Stores, Inc.,* 98 F.3d 572, 577 (10th Cir. 1996).

[25] *See H&R Block, Inc. v. Lovelace,* 493 P.2d 205, 212 (Kan. 1972); *Weber v. Tilman,* 913 P.2d 84, 90 (Kan. 1996).

[26] *See Weber,* 913 P.2d at 91.

[27] *See generally EEOC v. Safeway Stores*, 611 F.2d 795 (10th Cir. 1979).

at its making."[28] Here, plaintiffs merely quarrel with the scope of the injunction as originally entered. Plaintiffs have not alleged that the conditions in the aviation industry against which the settlement agreement and judgement were framed have substantially changed. Nor have plaintiffs averred that changes in the law merit relief from judgment. Tellingly, the cases cited by plaintiffs to suggest that the covenant is inequitable predate the judgment from which they now seek relief. Plaintiffs have failed to plead any change in law or fact that would make further enforcement of this judgment inequitable so as to justify relief under Rule 60(b)(5).

Within Count II of the Complaint, Plaintiffs also allege that "mistakes prevented [them] from obtaining the benefit of their defenses in the original action." Fed. R. Civ. P. 60(b)(1) governs relief from judgment due to mistake, inadvertence, surprise, or excusable neglect.[29] However, the Rule specifies that a motion for relief under 60(b)(1) must be made within one year after the judgment was entered.[30] The original judgment at issue was entered on December 14, 2000.[31] Thus, plaintiffs' Complaint is far outside the time period permitted to seek relief from judgment pursuant to Rule 60(b)(1). To the extent plaintiff's Complaint could be construed as including a claim for relief due to mistake, such claim must be dismissed.

Nor does the "catch all" provision of Rule 60(b)(6) provide a basis for relief from judgment. Rule 60(b)(6) provides relief from a judgment for "any other reason justifying relief

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[28] *Id.* at 800.

[29] Fed. R. Civ. P. 60(b)(1).

[30] Fed. R. Civ. P. 60(b)(6).

[31] *Dodson Int'l Parts, Inc. v. Phillip Altendorf, et al.,* 00-4134-SAC.

from the operation of a judgment."[32] The provision allows courts to grant relief in extraordinary circumstances.[33] However, this power should be reserved to situations in which it "offends justice" to deny relief.[34] Plaintiffs have not shown that continued enforcement of the settlement agreement to which they agreed with the advice of counsel is an extraordinary circumstance sufficient to afford relief pursuant to Rule 60(b)(6).

III. CONCLUSION

Defendant's Motion to Dismiss for lack of subject matter jurisdiction is denied. This Court entered the original judgment and therefore retains ancillary jurisdiction over plaintiffs' claims. Because plaintiffs have not sufficiently pled facts meriting relief from judgment pursuant to Rule 60, the Court must grant defendant's Motion to Dismiss plaintiffs' Complaint for failure to state a claim.

IT IS THEREFORE ORDERED BY THE COURT that Defendant's Motion to Dismiss (Doc. 2) is GRANTED.

IT IS SO ORDERED.

Dated this 24th day of September 2004.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge

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[32] Fed. R. Civ. P. 60(b)(6).

[33] *See Pelican Prod. Corp. v. Marine,* 893 F.2d 1143, 1146 (10th Cir. 1990).

[34] *Id.*